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No. 87-1593

In the Supreme Court of the United States
OCTOBER TERM, 1987

NORMAN'S COUNTRY MARKET, INC., ET AL., PETITIONERS

v.

ANN McLAUGHLIN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

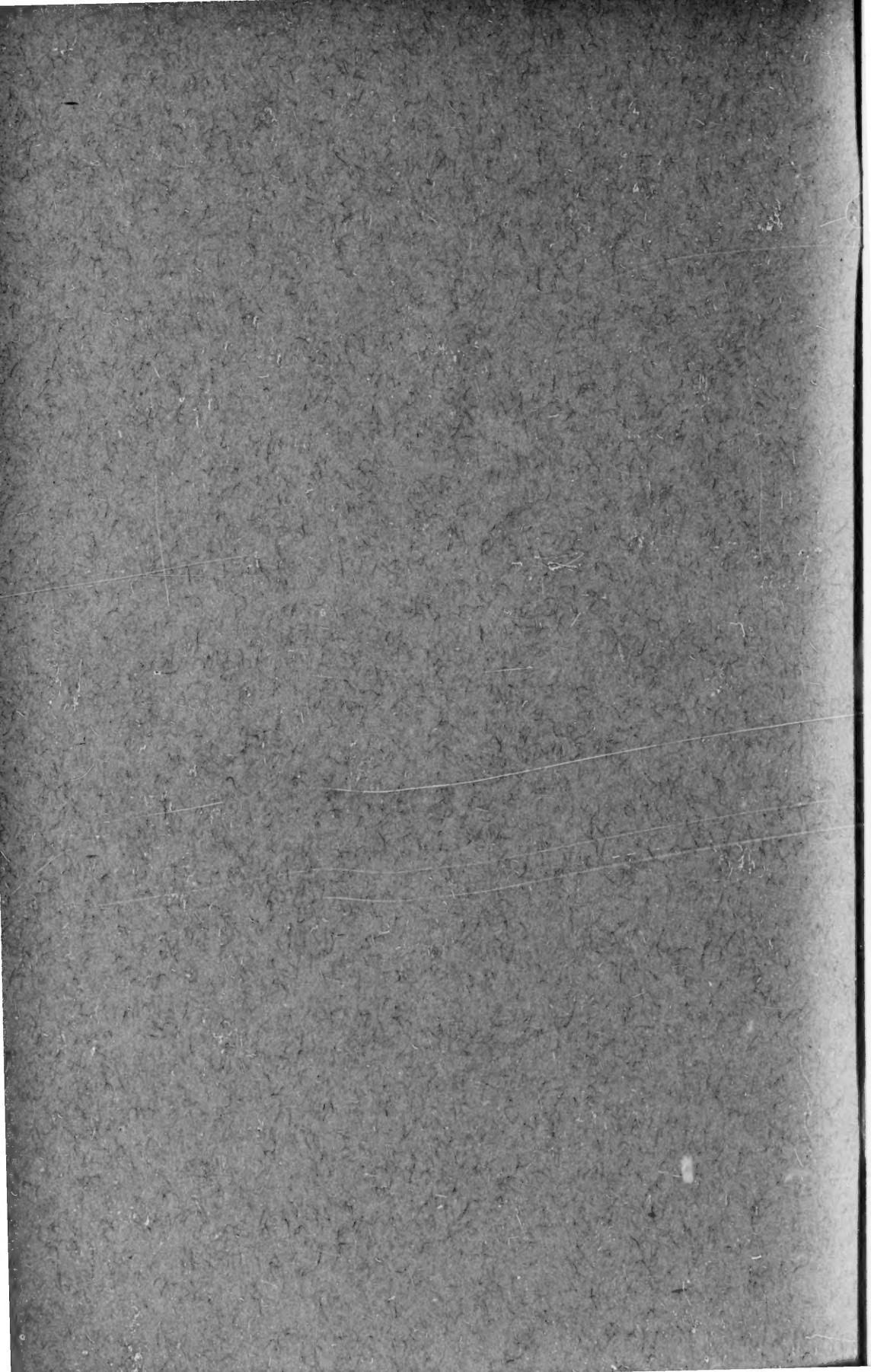
GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

ANNE PAYNE FUGETT
Attorney
Department of Labor
Washington, D.C. 20210

17 PJP



QUESTIONS PRESENTED

1. Whether the district court properly calculated the hours worked by individual employees in finding minimum wage and overtime violations of the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*
2. Whether the district court considered the appropriate factors in determining that certain employees were not executives, exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A26-A38) is reported at 835 F.2d 823. The opinion of the district court (Pet. App. A1-A19) is reported at 27 Wage & Hour Cas. (BNA) 1497.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1988. A petition for rehearing was denied on February 18, 1988. The petition for a writ of certiorari was filed on March 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 14, 1982, the United States District Court for the Northern District of Florida entered a consent judgment requiring petitioners, Norman's Country

Market, Inc., David A. Norman and India A. Norman, to pay a total of \$31,458.86 in back wages to a group of 41 employees for failure to pay them overtime wages of at least one and one-half times the regular rates at which they were employed in violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 207. The court also enjoined petitioners from further violations of the FLSA. See Pet. App. A1, A27. On December 9, 1985, the Secretary of Labor petitioned the district court to hold petitioners in contempt for failing to comply with the consent judgment (*id.* at A27). The Secretary alleged that petitioners had forced some employees to "kick back" the overtime wages awarded them by the 1982 judgment, fired other employees in retaliation for their refusals to do so, neglected to maintain records of hours worked and wages paid as required by 29 U.S.C. (& Supp. III) 211(c), and failed to pay the minimum wage and/or overtime wages to a number of employees in violation of 29 U.S.C. (& Supp. III) 206 and 207 (Pet. App. A27).

Petitioners denied any wrongdoing. They contended (see Pet. App. A2) that the employees who returned their back wages did so voluntarily, without any prompting from the Normans, and that the Normans in fact refused to accept the money themselves but instead suggested that the employees donate the money to the Normans' church. Petitioners further contended (*id.* at A4) that the employees who were fired were not fired for failing to return their awards but for general incompetence. With respect to the allegations of new overtime and minimum wage violations, petitioners contended (*id.* at A6, A10) that the employees in question fell into four different groups: they were either "executive[s]" and therefore exempt from the provisions of the FLSA (see 29 U.S.C. 213(a)); or they had entered into an agreed wage plan for

payment of overtime based on a specified regular rate pursuant to 29 U.S.C. 207(g)(3); or they did not in fact work the overtime alleged; or they were not employees at all. Petitioners did not contest, however, that they had failed to maintain records of employees' wages and hours as required by 29 U.S.C. (& Supp. III) 211(c) (Pet. App. A8).

2. The district court, following a trial, ruled in the Secretary's favor on virtually every issue. First, the court rejected petitioners' version of the circumstances surrounding the employees' return of their overtime wages as "simply beyond credibility" and held that petitioners had coerced the employees into returning their awards (Pet. App. A1-A4). The court therefore ordered that the awards be repaid. Second, the court ruled that petitioners had fired two employees in retaliation for not returning their back wage awards,¹ again finding that petitioners' "version of these events strains credulity" (*id.* at A4-A5). Relying on the testimony and worksheets of a compliance officer who had investigated petitioners' operations, the court calculated back wages and awarded the two employees a total of \$9,378 (*id.* at A5).

Third, the court held that petitioners had not carried their burden of proving that eight of their employees were executives, exempt from the FLSA's overtime requirements (Pet. App. A6-A7). Executives are defined by regulation to include any employee who earns more than \$250 per week, who supervises two or more employees, and whose primary duty is management. 29 C.F.R 541.1. Noting that the applicable regulations "outline the considerations which may be relevant to the determination of

¹ The court found that one other employee had not been fired (Pet. App. A5-A6).

whether an employee's primary duty is management," the district court considered the record evidence pertaining to those various factors and concluded that "[petitioners] managers are simply working foremen," not bona fide executives (Pet. App. A6-A9). Because of petitioners' failure to keep accurate wage and hour records, the court again relied on the work of the compliance officer to "reconstruct the hours of these employees" (*id.* at A9). The court found that each of these employees worked hours for which they should have been paid overtime and determined the back wages due based on "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Ibid.* (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). The district court carefully reviewed the compliance officer's calculations of back wages and, after correcting a mathematical error, found them "to be accurate to the degree required by *Mt. Clemens Pottery*" and awarded back wages in the amount of \$17,866 (Pet. App. A9-A10).

Fourth, based on employee testimony and petitioners' failure to present credible evidence in support of their position, the court rejected (Pet. App. A10-A11) petitioners' contention that six employees had been employed pursuant to a proper wage agreement in compliance with 29 U.S.C. 207(g)(3). Accordingly, the court concluded that those employees had "performed work for which they were not properly compensated" (Pet. App. A13). The court again used the compliance officer's computations to assist in calculating the amount of overtime worked by each employee, noting that petitioners failed "to negate the reasonableness of the inferences to be drawn from [the Secretary's] evidence." The court awarded these employees back wages totaling \$9,844.15 (*ibid.*).

Finally, the court found that the remaining employees cited by the Secretary were bona fide employees and that

the Secretary had “demonstrated that these employees worked hours for which they were not properly compensated” (Pet. App. A14). In the absence of any credible wage and hour records, the court was again required to determine the back wages “‘as a matter of just and reasonable inference’” and again utilized the compliance officers’ computations for assistance in calculating the amounts of recovery (*ibid.* (citation omitted)). After scrutinizing and correcting the compliance officer’s computations, the court awarded \$8,261.51 to these employees (*id.* at A14-A15).²

3. The court of appeals affirmed the district court’s decision with respect to all but one employee (Pet. App. A38). “After carefully reviewing the [evidence],” the court agreed with the district court that the employees whom petitioners claimed qualified for the executive exemption were in fact “nothing more than ‘working foremen’” (*id.* at A31). The court also concluded—after reviewing the relevant employee testimony and noting that the district court’s decision to discredit petitioners’ testimony was not clearly erroneous—that with one exception petitioners had failed to present sufficient evidence to establish any valid wage payment plans under 29 U.S.C. 207(g)(3) (Pet. App. A31-A34). With respect to that one employee, the court concluded (*id.* at A34) that there was sufficient evidence to establish that a wage agreement existed between peti-

² In addition to the awards of back wages for the various FLSA violations, the court awarded liquidated damages equal to the back wages pursuant to 29 U.S.C. 216(c). The court found that petitioners’ FLSA violations were neither in good faith nor based on reasonable grounds and that the coerced kickbacks and retaliatory discharges constituted a “blatant disregard for the Court’s authority” (Pet. App. A15-A17). The court also awarded pre-judgment and post-judgment interest to the two employees who were wrongfully discharged (*id.* at A17-A18).

tioners and the employee pursuant to which the employee was compensated for overtime hours at not less than one and one-half times his basic rate of pay. The court accordingly reversed the award of back pay to that employee.

The court of appeals rejected petitioners' further arguments that the district court had improperly placed the burden of proof on them with respect to compliance with the FLSA and had accepted unreasonable estimates of allegedly uncompensated wages (Pet. App. A35). The court stated (*ibid.*, quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687) that "[t]he employee, in the event an employer fails to keep accurate records, need only show 'he has in fact performed work for which he was improperly compensated and . . . produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'" The court noted (*ibid.*) that there was "a substantial amount of conflicting evidence" in the record and that it was up to the district court to make the necessary credibility determinations. "We do not believe," the court concluded (*id.* at A36), "the district court erroneously placed the burden of proof on [petitioners] and we do not believe the calculations adopted by the court for its own use to be an unreasonable estimate of the uncompensated wages."

Finally, the court of appeals rejected petitioners' contention that the record did not support the district court's conclusion that they had forced certain employees to kick back their back wage checks and had fired others in retaliation for not doing so (Pet. App. A36-A38). The court determined that the district court's factual findings on these issues were not clearly erroneous (*id.* at A37-A38).

ARGUMENT

The factbound decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. In *Anderson v. Mt. Clemens Pottery Co., supra*, this Court held that, where an employer has failed to keep proper records of wages and hours, an employee seeking to prove a violation of the FLSA need only produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" (328 U.S. at 687). Petitioners argue (Pet. 11-13) that the *Mt. Clemens* "just and reasonable" inference standard applies only to proof of damages and that the court of appeals countenanced an "unprecedented extension" of *Mt. Clemens* by applying the same standard to the employee's proof of liability. In fact, the Court in *Mt. Clemens* applied a "just and reasonable inference" standard to establish the hours actually worked by the employees, precisely the question at issue here. There is no dispute in this case as to the amount of wages paid to the employees in question. Hence, there is no dispute that if the employees are covered by the FLSA and if they worked the hours found by the district court, then petitioners violated the FLSA. Once the district court determined that the employees were, contrary to petitioners' principal contention, bona fide employees covered by the FLSA, the court was fully justified in drawing any just and reasonable inferences from the evidence as to the hours they actually worked.

Petitioners' real complaint is not that the decision below allows an "unprecedented extension" of *Mt. Clemens*; they simply disagree with the factual conclusions that the district court drew and the court of appeals affirmed. It

has long been the rule, however, that this Court does not “undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.” *Graver Tank & Mfg. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Petitioners have made no such showing in this case. Indeed, for most of the employees in question, petitioners did not even dispute the allegation that they worked overtime. Thus, petitioners did not contest the fact that eight managers worked overtime, but rather attempted to claim that the managers were executives, exempt from the FLSA’s overtime requirements under 29 U.S.C. 213(a). Pet. App. A6. Similarly, petitioners argued not that six other employees did not work overtime but rather that they were correctly paid overtime compensation because their wages were fixed by agreement pursuant to 29 U.S.C. 207(g)(3). Pet. App. A10. In any event, the district court carefully reviewed the calculations of the compliance officer with respect to each employee and found them to be accurate based on its own resolution of the conflicting evidence. The court of appeals, “[a]fter carefully reviewing the record” (*id.* at A31), concluded that, based on the conflicting evidence presented at trial and the credibility determinations made by the district court, “the calculations adopted by the court for its own use [were not] an unreasonable estimate of the uncompensated wages” (*id.* at A36). No further review of that factbound conclusion is warranted.

2. Petitioners object (Pet. 11, 13-15) to the admission into evidence of the compliance officer’s computations of the back wages due on the grounds that the findings contained in his investigative report are based on employees’ statements and are therefore hearsay. The compliance officer’s computations, however, were offered not to prove the truth of the employee statements on which they were

based, but "to assist the district court" in performing the back wage calculations (Pet. App. A35). Contrary to petitioners' contention (Pet. 13), the district court did not rely on those computations as evidence of the number of uncompensated hours worked; rather the district court concluded, based on the evidence presented at trial, that the computations accurately reflected the number of uncompensated hours worked. The court of appeals expressly affirmed the district court on this basis (Pet. App. A35-A36). Accordingly, those computations were not hearsay. Fed. R. Evid. 801(c).

Furthermore, the decision below is consistent with both *Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986), and *Hodgson v. Humphries*, 454 F.2d 1279, 1283 (10th Cir. 1972), upon which petitioners mistakenly rely (Pet. 13). In both those cases, the courts of appeals ruled that a compliance officer's back wage calculations were admissible in evidence to assist the district court with the methodology of the computations (*Seto*, 790 F.2d at 1449; *Humphries*, 454 F.2d at 1282-1283). As noted above, that is precisely what the district court did and what the court of appeals approved in this case.

3. Petitioners contend (Pet. 15-16) that the Secretary wrongly refused to identify the substance of the evidence that the compliance officer uncovered in his investigation, including the names of the individuals who had provided him information, and therefore deprived petitioners of the opportunity both to persuade the compliance officer that his findings were incorrect and to discredit his sources at trial. Petitioners contend that this deprivation violates due process and conflicts with this Court's decision in *Brock v. Roadway Express, Inc.*, No. 85-1530 (Apr. 22, 1987).³

³ Petitioners failed to raise this claim before the district court and mentioned it only in passing before the court of appeals. Appellants

In *Roadway Express*, the Court examined the Secretary's procedures implementing Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. (& Supp. III) 2305, which requires the Secretary, upon investigation of an employee's complaint of retaliatory discharge and determination that it was in violation of the statute, to order temporary reinstatement of the employee without a hearing. The Court concluded that, because the reinstatement constituted at least a temporary deprivation of the employer's property right, due process requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response and an opportunity to meet with the investigator and present statements from rebuttal witnesses. Slip op. 11 (plurality opinion). In this case, by contrast, no deprivation of the employer's property occurs as a result of the compliance officer's report because the Secretary has no direct enforcement authority. Binding action is taken only by the district court following a trial on the substance of the Secretary's allegations.⁴

The proceedings in district court afforded petitioners due process of law. The Secretary's contempt petition fully apprised petitioners of the nature of the violations and, in

Br. 47 n.25. The court of appeals did not address the issue, and there is no reason for the Court to depart from its ordinary rule of not reviewing issues that have not been raised or resolved in the courts below. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

⁴ Although due process does not require it, the Secretary's compliance officers regularly conduct conferences with the employer at the close of investigations. 3 United States Department of Labor, Wage and Hour Division, *Field Operations Handbook*, § 53B01 (Oct. 22, 1971). That procedure was followed in this case.

an attached exhibit, listed the names of the affected employees and amounts owed. See Pet. App. A15. Contrary to petitioners' assertions, the Secretary provided them in advance of trial with copies of the wage transcription and computation reports for each affected employee, as well as a back wage summary (*ibid.*). These documents contained the names and addresses of all employees for whom the Secretary was seeking back wages, the time periods in which the violations occurred, the total amounts due, and the compliance officer's calculations of back wages for each of them based on estimates of hours worked. Also during discovery, the Secretary's counsel informed petitioners' counsel that he planned to subpoena for trial all the employees for whom back wages were claimed and would not call any other witnesses except petitioners and the compliance officer. Also prior to trial, petitioners deposed the compliance officer and thoroughly questioned him about the findings of his investigation and his method of calculating the back wages; at trial, they cross-examined him and put on witnesses in an attempt to rebut his testimony. These procedures plainly satisfied the requirements of due process.

4. Finally, petitioners claim (Pet. 17-19) that the district court determined that their "managers" were not executives exempt from the FLSA based solely on the amount of time each employee spent on managerial duties. Petitioners claim that the court of appeals' affirmance of that determination conflicts with decisions in several other circuits. See *Cobb v. Finest Foods, Inc.*, 755 F.2d 1148 (5th Cir. 1985); *Donovan v. Burger King*, 675 F.2d 516, 521 (2d Cir. 1982); *Donovan v. Burger King*, 672 F.2d 221, 226 (1st Cir. 1982). Petitioners are mistaken. Both the district court and the court of appeals plainly recognized that time spent on managerial duties is not the only con-

sideration in deciding whether an employee's primary duty is management.

The district court expressly noted that the applicable regulations "outline the considerations which may be relevant" (Pet. App. A7) and specifically referred to factors in addition to time in its decision. For example, the court cited testimony by one employee that "he had few management duties as seafood manager" (*ibid.*). It noted another employee's "similar testimony" and his consultation with petitioner David Norman before performing any management tasks (*ibid.*). The court also pointed to employees' statements that their management duties were really "production duties" (*ibid.*) or made them nothing more than "another working employee" (*id.* at A7-A8). Finally, the court relied on the compliance officer's observations of the type of work the employees performed (*id.* at A8).

The court of appeals also set forth the language of the regulation specifying factors in addition to time for determining an employee's primary duty (Pet. App. A29-A30) and looked "at the actual work performed" by each "manager" (*id.* at A31) in deciding that the district court's determination was not clearly erroneous. Because the decision below does not countenance exclusive reliance on a "majority of time" standard, it does not conflict with the decisions cited by petitioners that arguably reject determinations of primary duty based on time alone.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

ANNE PAYNE FUGETT
*Attorney
Department of Labor*

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